United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-6117

United States Court of Appeals

FOR THE SECOND CIRCUIT

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER and BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL on behalf of themselves and all other nonprofit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., and which are reimbursed for Medicaid Services rendered to hospital patients,

Plaintiffs-Appellees,

—v.—

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York,

Defendants-Appellants,

—and—

DAVID MATHEWS, as Secretary of the U.S. Department of Health, Education & Welfare,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES

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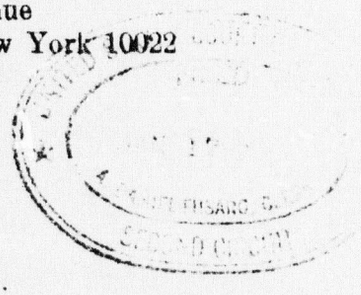

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-v.-

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-and-

David Mathews, as Secretary of the U.S. Department of Health, Education & Welfare,

Defendant.

BRIEF FOR PLAINTIFFS-APPELLEES

COUNTERSTATEMENT OF THE ISSUES

1. Whether the retroactive repeal of the requirement in the Medicaid Act that participating States waive their Eleventh Amendment immunity ousts a Federal District Court of jurisdiction over a pending lawsuit where the legislative history of the repealer indicates that its retroactive

nature was intended merely to protect states from the imposition of a statutory penalty for failure to have waived their Eleventh Amendment immunity, and where a state executed a judicial waiver of its Eleventh Amendment immunity on two other occasions.

2. Whether a Federal District Court has any discretion to deny the award of money damages for a State's violation of the Medicaid Act and, if so, whether such discretion should be exercised where the sums awarded represented reimbursement to hospitals of their "reasonable cost" of providing services to Medicaid patients as required by the Medicaid Act.

3. Whether, assuming arguendo that a State's waiver of Eleventh Amendment immunity has been voided retroactively by the congressional repealer so as to invalidate a Federal District Court's award of retroactive money damages, the District Court nevertheless properly awarded declaratory and injunctive relief against the State.

COUNTERSTATEMENT OF THE CASE

This case involves a challenge by the voluntary and public hospitals of the State of New York* ("the hospitals") to the promulgation and implementation by the

* The plaintiff class consists of approximately 275 voluntary and public hospitals. (First Amended Complaint ¶20, 98a). Unless otherwise stated, all figures in parentheses refer to pages of the Joint Appendix.

defendant New York State officials* ("State defendants") of certain amendments to the New York State Medicaid Plan which provides for the reimbursement to the hospitals of costs incurred in providing services to Medicaid patients. The hospitals contend that the challenged amendments are illegal because, among other things, they: (1) were not approved by the Secretary of the United States Department of Health, Education and Welfare ("the Secretary") prior to their implementation by the State defendants; and (2) do not result in reimbursement to the hospitals of the "reasonable cost" they incur in providing services to Medicaid patients, as required by the Medicaid Act.

By decision dated July 29, 1976 (407a), the United States District Court for the Southern District of New York (Lasker, J.), found that, because the State defendants had not obtained pre-implementation approval from the Secretary, the challenged amendments were illegal. Accordingly, by final judgment dated July 30, 1976 and entered August 2, 1976 (428a), the District Court permanently enjoined the State defendants from implementing the amendments until approval had been obtained from the Secretary and ordered that reimbursement rates be recomputed and retroactive payments made to the hospitals according to the approved New

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* The hospitals also named the Secretary of the United States Department of Health, Education and Welfare as a defendant.

York State Medicaid Plan then in effect.

Rejecting the State defendants' arguments to the contrary, the District Court concluded that the Eleventh Amendment did not bar the relief sought. This was because a waiver of immunity had been executed on behalf of the State of New York in order to bring the State's Medicaid program into compliance with the requirements of the Medicaid Act.

The District Court did not pass upon the merits of the hospitals' claim that the new rates did not provide for "reasonable cost" reimbursement, as required by statute.

On August 16, 1976, one day before argument was to be heard by this Court on the State defendants' motion for a stay pending appeal from the August 2nd judgment, the Secretary approved most of the amendments previously enjoined by the District Court. This Court then remanded the case to the District Court for a finding as to whether or not the amendments could be applied retroactively. By memorandum order dated November 5 and entered November 9, 1976 (56la), the District Court held that the amendments could not be so applied and directed the State defendants to comply with its prior orders.

The State defendants then moved, in this Court, for

a stay pending appeal from the November 9th order,* basing the application on recent legislation which had repealed the provision in the Medicaid Act requiring that participating states waive their Eleventh Amendment immunity from suit. This Court denied the stay application from the bench on December 14, 1976.

COUNTERSTATEMENT OF THE FACTS

The plaintiff hospitals provide care and treatment to Medicaid-eligible patients -- the low income and indigent citizens of the State of New York. For these services they receive reimbursement which is jointly funded by federal, state and local authorities, pursuant to Title XIX of the Social Security Act, 42 U.S.C. §§1396-1396i. This reimbursement is paid on a per diem basis at a rate calculated according to methods and standards contained in a document known as a "State Plan for Medical Assistance" ("State Plan").** The rate is not calculated after services are provided, but rather is fixed prospectively on the basis of projected historical costs trended forward to allow for inflation.

Traditionally, new rates are announced before the first of each year. The purpose of this prospective

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* The appeal presently being considered consolidates the appeals from the August 2nd judgment and the November 9th order.

** That portion of the New York State Plan which relates to the calculation of reimbursement rates paid to the hospitals is found in Title 10, New York Codes, Rules and Regulations.

rate system is to encourage efficient hospital operation. Theoretically, a hospital which knows its reimbursement rate before it provides services will endeavor to reduce its costs to or below the announced rates.

The State defendants did not announce a new schedule of 1976 reimbursement rates by January 1, 1976, rather, they announced an "interim schedule" which froze the 1976 rates at 1975 levels.*

The Present Action

The hospitals commenced this class action on May 5, 1976, alleging, among other things, that the de facto freeze on reimbursement rates violated a requirement found in the Medicaid Act, 42 U.S.C. §1396a(a)(13)(D), and the regulations promulgated thereunder, 45 C.F.R. §250.30(a)(2), that changes in a State Plan affecting the calculation of inpatient hospital reimbursement rates must be approved in advance of implementation by the Secretary. Since the New York State Plan did not authorize the State defendants to limit payment for services rendered in 1976 to the rates

* Contrary to the statement made by the State defendants (See Brief for State defendants at 4), a new schedule of rates could have been published for 1976 by application of the reimbursement methodology contained in the New York State Plan then in effect. The rate freeze was for the benefit of the State at the expense of the hospitals whose costs had increased as a result of the inflationary pressures to which the entire economy was subject.

paid in 1975, it was alleged that the freeze was, in effect, imposed pursuant to an unapproved amendment to the New York State Plan (Complaint ¶34, 16a).

In addition, the hospitals alleged that the freeze violated the requirements found in 42 U.S.C. §1396a(a)(13)(D) that a hospital be reimbursed for the "reasonable cost" of the in-patient Medicaid services it provides* (Complaint ¶32, 15a). Since the 1975 rates were calculated pursuant to the approved New York State Plan then in effect, by definition these rates provided reasonable cost reimbursement for services provided in 1975. However, since the hospitals' costs had increased, due in large part to inflationary pressures, it was clear that payment for 1976 services at 1975 rates did not provide "reasonable cost" reimbursement.

The State defendants ended their de facto freeze on reimbursement rates on July 1, 1976. In its place, a new rate schedule was implemented, calculated pursuant to amendments to the New York State Plan which had not been approved by the Secretary. The rates for approximately one-third of the members of the class were to be less than those paid under the de facto freeze (Amended Complaint ¶32, 101a).

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* 42 U.S.C. §1396a(a)(13)(D) requires that a State Plan must provide "for payment of the reasonable cost of inpatient hospital services provided under the plan . . . ."

Accordingly, the hospitals amended their complaint on July 16, 1976, and moved for a preliminary injunction against the implementation of these new rates (114a). The Amended Complaint alleged that the new rates were subject to the same infirmities as were the frozen rates, because (1) they had been calculated pursuant to a methodology not approved in advance by the Secretary (Amended Complaint ¶44, 105a), and (2) they did not provide for reimbursement to the providers of the "reasonable cost" they incur in providing Medicaid services (Amended Complaint ¶45, 105a).

The District Court held two days of hearings -- the first on July 20, 1976 (166a), and the second on July 28, 1976 (297a). Recognizing that the Amended Complaint raised Eleventh Amendment issues, Judge Lasker specifically asked Assistant Attorney General Jesse Fine the following question:

> "Can I have a representation, or do I have a representation from the state that if the court finds the state procedures are invalid and if the state is nevertheless not enjoined but later on is found to owe money to the hospitals, that it will not raise the Eleventh Amendment as a defense to any suit by the hospitals to secure that money?"

Assistant Attorney General Fine replied:

> "I think I can make that statement, your Honor."
>
> (Transcript of July 28, 1976 hearing, 403a)

The August 2nd Judgment

By opinion dictated in chambers on July 29, 1976

(407a), the District Court granted the hospitals a permanent injunction. The District Court held that it had subject matter jurisdiction over the hospitals' claims, that the Eleventh Amendment did not bar the relief sought and that the State defendants had violated the pre-implementation approval requirement of the Medicaid Act.

Relying on Catholic Medical Center v. Rockefeller, 305 F. Supp. 1256 (E.D.N.Y. 1969), aff'd on the opinion below, 430 F.2d 1297 (2d Cir.), appeal dismissed, 400 U.S. 931 (1970), the District Court held that it had subject matter jurisdiction over the hospitals' claims under 28 U.S.C. §1331. It therefore rejected the State defendants' affirmative defense of lack of subject matter jurisdiction. (427a)

The District Court also rejected an affirmative defense based on the Eleventh Amendment and denied a motion to dismiss that had been made on that ground. The District Court found that the State defendants were bound by a waiver of Eleventh Amendment immunity that had been executed on behalf of the State of New York pursuant to 42 U.S.C. §1396a(g). (418a-421a) That provision of the Medicaid Act required that a State Plan include a "consent . . . to the exercise of the judicial power of the United States" and a waiver of Eleventh Amendment immunity with respect to claims arising out of the furnishing of in-patient hospital services. The consent

to suit and waiver made on behalf of New York State had been executed on March 30, 1976 (4a).

Finally, the District Court addressed the merits of the hospitals' claim with respect to pre-implementation approval. Finding that the Medicaid Act, 42 U.S.C. §1396a(a)(13)(D), and the regulations promulgated thereunder, 45 C.F.R. §250.30(a)(2), required a state to obtain the Secretary's approval before amending its State Plan, the District Court concluded that the amendments in issue were illegal because the State defendants had not obtained this pre-implementation approval. (422a-427a)

Accordingly, by judgment dated July 30, 1976 and entered August 2, 1976 (428a), the District Court declared that the amendments to the New York State Plan were unlawful, permanently enjoined the State defendants from implementing the amendments until they had been approved by the Secretary, and directed the State defendants to "promptly recompute and pay reimbursement rates" to the hospitals according to the approved New York State Plan in effect from January 1, 1976 until the date of the Secretary's approval of the amendments. The District Court stayed the judgment for twelve days, but the stay lapsed, and was not in effect, on August 15, 1976.

The November 9th Order

On August 16, 1976, one day before argument in this Court on the State defendants' application for a stay pending appeal from the District Court's August 2nd judgment, the Secretary approved several of the amendments* to the New York State Plan (22a, 432a).** Despite its knowledge of the Secretary's approval, this Court denied from the bench the State defendants' motion for a stay. In addition, it directed that the parties return to the District Court for a determination as to whether or not the State defendants could implement the August 16, 1976 amendments retroactively to January 1, 1976.

Thereafter, the State defendants renewed their application to the District Court for a stay of its August 2nd judgment, arguing that compliance with the August 2nd judgment would result in payments which would have to be recouped if the District Court ruled in their favor on retroactivity. The District Court granted the stay on September 28, 1976, on condition that the State defendants agree to pay

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* As the State defendants admit (Brief for State defendants at 20 n.*), the Secretary did not approve one of the Amendments, 10 NYCRR §86.26, until October 4, 1976.

** In view of the Secretary's August 16, 1976 approval, the hospitals filed a Second Amended Complaint dated September 17, 1976, which added a challenge to the Secretary's action (481a).

interest on any payments stayed pending the Court's deliberation on the retroactivity issue (505a).

At a conference held on September 28, 1976 (511a), Assistant Attorney General Fine stated that he would "have to clear it with the people in Albany" before acceding to the District Court's condition (531a). Thereafter, the State defendants informed the District Court that they were agreeable to the Court's condition. Accordingly, by order signed October 15, 1976, and entered October 29, 1976, the District Court stayed the August 2nd judgment on the express condition that the State defendants pay interest on any monies withheld by the operation of the stay (542a).*

The District Court decided the retroactivity issue on November 5, 1976 (561a).** It concluded that the amendments to the New York State Plan could not be applied retroactively, relying heavily on the pre-implementation approval requirement

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* Under the District Court's order, interest was to be calculated from September 28, 1976 until the date of payment of any sums found to be due to the hospitals.

** Notwithstanding the fact that the repeal of the Eleventh Amendment waiver requirement in the Medicaid Act was signed into law by the President on October 18, 1976 (see Pub. L. No. 94-552, 94th Cong., 2d Sess. (1976)), the State defendants did not inform the District Court of this development until after its decision on the retroactivity issue.

found in the Medicaid Act and regulations.* It therefore directed, by order entered November 9, 1976 (561a), that the State defendants recompute the reimbursement rates for the period prior to the Secretary's approvals according to the approved New York State Plan in effect at that time and pay the rates so calculated.

After filing a notice of appeal from the November 9th order (570a), the State defendants sought a stay pending appeal in this Court. Many of the Eleventh Amendment issues now raised were fully presented in the moving papers. Chief among these was the State defendants' claim that legislation repealing the Eleventh Amendment waiver provision contained in the Medicaid Act ousted the federal courts of jurisdiction over the hospitals' claims for retroactive relief. Nevertheless, on December 14, 1976, this Court denied the State defendants' stay application from the bench.

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* The State defendants have waived the issues of pre-implementation approval and retroactivity on this appeal since they state that they "will not address in this brief [these] non-jurisdictional challenges to the decision of the District Judge" (Brief for State defendants at 7). Since nonjurisdictional issues are waived unless raised by the appellant, see, e.g., Nanda v. Ford Motor Co, 509 F.2d 213, 225 (7th Cir. 1974); Mississippi River Corp. v. Federal Trade Commission, 454 F.2d 1083, 1093 (8th Cir. 1972); 9 J. Moore, Federal Practice 3756 (2d ed. 1975); cf. Crane Co. v. Aeroquip Corp., 504 F.2d 1086, 1093 (7th Cir. 1974), it is clear that the issues of pre-implementation approval and retroactivity are not before the Court on this appeal.

SUMMARY OF ARGUMENT

1. The District Court's order directing the State defendants to recompute and pay reimbursement to the hospitals according to the approved New York State Plan in effect at the time the order was entered is not barred by the Eleventh Amendment. The retroactive repeal of the waiver requirement did not oust the District Court of jurisdiction since the retroactive nature of the repealer was intended merely to protect states from the imposition of a statutory penalty for failure to have waived their Eleventh Amendment immunity. Moreover, the State defendants executed a judicial waiver of Eleventh Amendment immunity on two other occasions.

2. Since the purpose of the Eleventh Amendment waiver requirement in the Medicaid Act was to enable providers to obtain money judgments against states in federal court, the District Court did not have the equitable discretion to deny an award of money damages to the hospitals. Moreover, even assuming arguendo that the District Court was vested with such discretion, it is clear that no abuse of discretion occurred in the instant case since the District Court's award of monetary relief was consistent with the federal policy standards set forth in the case law of this Circuit. At any rate, the State defendants are precluded from now claiming that the District Court abused its dis-

cretion. This is because they neither asked the District Court to exercise such discretion nor directed the District Court's attention to any factors which would have supported the exercise of such discretion in their favor.

3. The Eleventh Amendment, even if applicable, does not bar the declaratory and prospective injunctive relief awarded by the District Court. Therefore, at the very least, this Court should affirm the findings below: (a) declaring that the State defendants' implementation of the challenged amendments prior to their approval by the Secretary was illegal; (b) prospectively enjoining the implementation of these amendments until they had been approved by the Secretary; and (c) declaring that the State defendants were not entitled to implement the challenged amendments retroactively.

ARGUMENT

POINT I

THE ELEVENTH AMENDMENT DOES NOT BAR THE RELIEF THE HOSPITALS HAVE BEEN GRANTED

Contrary to the interpretation advanced by the State defendants, the recent legislation repealing the mandatory waiver provision contained in the Medicaid Act did not oust the federal courts of jurisdiction over pending cases, did not void the State defendants' prior statutory waiver, and did not authorize the State defendants to withdraw that waiver insofar as it affects this lawsuit. Furthermore, the State defendants waived any Eleventh Amendment immunity they might otherwise have had on two other occasions. Plainly these latter waivers were not affected by the recent legislation.

The Repeal of the Eleventh Amendment Waiver Requirement in the Medicaid Act

On March 30, 1976, the State of New York consented to the exercise of federal judicial power and waived any Eleventh Amendment immunity that it might otherwise have had with respect to claims by providers for in-patient hospital care reimbursement. This action was taken to bring the New York State Plan into compliance with the Medicaid Act, 42

U.S.C. §1396a(g),* and to avoid the imposition of a penalty levied for noncompliance. 42 U.S.C. §1396b(1).**

The State defendants now contend that federal jurisdiction over the hospitals' claims has been ousted by recent legislation, that their prior waiver of Eleventh Amendment

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* 42 U.S.C. §1396a(g) provides:

> (g) Notwithstanding any other provision of this subchapter, a State plan for medical assistance must include a consent by the State to the exercise of the judicial power of the United States in any suit brought against the State or a State officer by or on behalf of any provider of services (as defined in section 1395x(u) of this title) with respect to the application of subsection (a)(13)(D) of this section to services furnished under such plan after June 30, 1975, and a waiver by the State of any immunity from such a suit conferred by the 11th amendment to the Constitution or otherwise.

** 42 U.S.C. §1396b(1) provides:

> (1) Notwithstanding any other provision of this section, the amount payable to any State under this section with respect to any quarter beginning after December 31, 1975, shall be reduced by 10 per centum of the amount determined with respect to such quarter under the preceding provisions of this section if such State is found by the Secretary not to be in compliance with section 1396a(g) of this title.

The District Court correctly rejected the State defendants' claim that the waiver requirement was unconstitutional. A state may, of course, waive its Eleventh Amendment immunity. Edelman v. Jordan, 415 U.S. 651, 673 (1974). And, it has long been the law that Congress may condition a voluntary grant of federal funds on the relinquishment of a constitutional right. See, e.g., Oklahoma v. United States Civil Service Commission, 330 U.S. 127 (1947); Massachusetts v. Mellon, 262 U.S. 447 (1923); Cf. Rothstein v. Wyman, 467 F.2d 226, 238 (2d Cir. 1972), cert. denied, 411 U.S. 921 (1973).

immunity has been voided, and that they have been authorized to withdraw that waiver with respect to this lawsuit. The State defendants find all this in Pub. L. No. 94-552, 94th Cong., 2d Sess. (October 18, 1976), which repealed 42 U.S.C. §§1396a(g) and 1396b(l).

As we show below, the repealing legislation does not have any bearing on this lawsuit. To the contrary, the legislation merely eliminated the mandatory waiver and consent requirement previously contained in the Medicaid Act and the concomitant penalty imposed if such a waiver and consent was not given.

Pub. L. No. 94-552 is brief:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (g) of section 1902 of the Social Security Act [42 U.S.C. §1396a(g)] and subsection (l) of section 1903 of such Act [42 U.S.C. §1396b(l)] are repealed.
> Sec. 2. The amendments made by the first section shall take effect as of January 1, 1976."

The limited scope of Pub. L. No. 94-552 becomes clear when the legislation is set against the statutory provisions it repealed. The consent to suit and waiver provision, 42 U.S.C. §1396a(g), was mandatory in nature, requiring as it did that a State Plan "must include a co[illegible]sent . . . to the exercise of the judicial power of the United States . . . and a waiver by the State of any immunity

from such a suit conferred by the 11th amendment . . . ." (emphasis supplied). By repealing this provision, Congress did no more than remove the mandatory requirement that a State Plan must contain the consent and waiver of immunity. The repealing legislation went no further. Certainly, the removal of a requirement that a state must consent to the exercise of federal judicial power and waive its Eleventh Amendment immunity does not amount to an ouster of jurisdiction, does not automatically void waivers previously executed and does not authorize the State defendants to withdraw their waiver insofar as it affects this lawsuit.*

The fact that the repealing legislation was made retroactive to January 1, 1976 does not undercut this analysis. By the express terms of 42 U.S.C. §1396b(1), any state which had not executed a consent to suit by the end of the first quarter of 1976 would have been subjected to a mandatory

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* In an attempt to bolster their argument that the District Court was divested of jurisdiction after the entry of its judgment and order, the State defendants rely heavily on two allegations which are not part of the record. Thus, they allege that HEW issued a directive which purportedly instructed states to withdraw retroactively waivers which they had previously executed, and that the Secretary then approved New York State's purportedly retroactive revocation of its waiver (Brief for State defendants at 6). Even if the District Court had been apprised of these alleged occurrences, the result it reached would have been the same. The fact that the Secretary may have directed states to remove prior waivers from their State Plans and even approved such an amendment to the New York State Plan, is irrelevant. Since Pub. L. No. 94-552 did not affect pending lawsuits, the Secretary's alleged directive and approval were beyond his powers and unauthorized.

ten per cent reduction in Medicaid funding. The repealing legislation, made retroactive to January 1, 1976, removed the authorization for the imposition of this penalty. As the legislative history of Pub. L. No. 94-552 makes clear, the purpose of making the repealing legislation retroactive was to void the operation of the penalty provision:

> "[42 U.S.C. §§1396a(g) and 1396b(l)] also provide[s] that any State which fails to change its State medical assistance plan to consent to suits by providers concerning payment of reasonable cost is subject to a penalty of a reduction of 10 percent in the amount of the Federal share of their Medicaid funds. This sizeable penalty went into effect almost immediately upon enactment of the legislation; the bill became law on December 31, 1975, and States had to change their plans before March 31, 1976. This rapid change in plans has been impossible for many States to affect; some even require a meeting of the State legislature to change the State plan.
>
> Further, several States have refused to make the change in State plan because of their stong concern about the inadvisability of waiving their immunity. Many States are thus now subject to the penalty, in amounts which could total over $40 million in the first quarter. This substantial penalty bears little relation to any substantive question relative to these States' administration of the Medicaid program . . . ."

H.R. Rep. No. 1122, 94th Cong., 2d Sess. 4-5 (1976).

This express congressional desire to prevent a state from being penalized for its failure to execute a consent to suit and waiver also made it necessary to repeal 42 U.S.C. §1396a(g) retroactively. Otherwise, a state which

had not complied with the mandatory directive contained in that section would have been subject to possible sanctions imposed in a compliance proceeding. See 42 U.S.C. §1396c.

The State defendants totally misrepresent the legislative history of Pub. L. No. 94-552. For example, a careful reading of the statement of Representative Carter, referred to at page 12 of the State defendants' brief, reveals that his major objection to 42 U.S.C. §§1396a(g) and 1396b(1) was not that the legislation was unwise, but rather that it was enacted too hastily.

In fact, Representative Carter's statement supports the hospitals' claim that 42 U.S.C. §§1396a(g) and 1396b(1) were repealed retroactively to void the operation of the penalty provision. Thus, after making the statement referred to by the State defendants,* Representative Carter went on to add:

> "We are now faced with a situation which deserves immediate attention. Many States may be penalized 10 percent of their Federal medicaid funds as a result of this ill-considered provision.
>
> It has been estimated that the States which are not in compliance with the December legislation may lose a total of $160 million for fiscal year 1976.

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* Even the passage quoted by the State defendants supports the hospitals' interpretation, and this Court should not be misled by the artful editing of that passage by the State defendants. As excerpted by the State defendants, the following statement is attributed to Representative Carter:

[Footnote continued on next page]

> My State of Kentucky stands to lose almost $12 million in Federal money for the medicaid program as a result of this penalty.
>
> I have received a letter from the Governor of Kentucky urging repeal of this problematic provision as soon as possible. I know that other Members, too, have received similar requests."

122 Cong. Rec. 4280 (daily ed. May 12, 1976) (emphasis supplied).

The State defendants claim that one of the primary purposes for making the repealing legislation retroactive was to prevent an "unreasonable burden of suits from falling on states" which did not waive their immunity.* However, when the sentence from the House Report which the State defendants excerpt is read in its entirety, it becomes clear that the State defendants have misread the legislative history. That sentence reads as follows:

[Footnote continued from previous page]

> "Had the responsible committees been given the opportunity to examine this legislation and hold hearings, it would have become apparent that . . . that was not a good way to legislate."
> Brief for State defendants at 12.

When the sentence beginning before the ellipsis is reprinted in its entirety, Representative Carter's remarks take on a different hue:

> "Had the responsible committees been given the opportunity to examine this legislation and hold hearings, it would have become apparent that prompt compliance was impossible for a number of States."
> 122 Cong. Rec. 4280 (daily ed. May 12, 1976).

Thus, it is clear that Representative Carter's concern was with the effect of the penalty provision upon non-complying states.

* Brief for State defendants at 12, quoting H.R. Rep. No. 1122, supra, at 4.

> "The Department of Health, Education, and Welfare, the Governors and Attorneys General of the States are all concerned that the result [of waivers executed in compliance with 42 U.S.C. §1396a(g)] will be an unreasonable burden of suits which will be costly in terms of time and legal manpower, and which will make efficient program administration virtually impossible." H.R. Rep. No. 1122, supra, at 4 (emphasis supplied).

The use of the words "will be", indicates that the congressional concern was with future lawsuits and not with pending litigation.*

Finally, contrary to the assertion of the State defendants, the House Report did not indicate that Congress felt that a more appropriate vehicle for testing state compliance with federal Medicaid standards "was in existence".** To the contrary, the Committee pointed out that the compliance proceeding mechanism upon which the State defendants would have the hospitals rely "has proved to be unwieldly and time-consuming and has, in fact, only been undertaken once by HEW." H.R. Rep. No. 1122, supra, at 3. A similar conclusion was also reached by the Senate Committee on Finance, which recommended "that some alternative mechanism for the adjudication of disputes concerning Medicaid reimbursement

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* Despite diligent research, we have been unable to find any other case presently pending in any federal court in which an Eleventh Amendment waiver made pursuant to 42 U.S.C. §1396a(g) was invoked as either a basis of jurisdiction or authorization for the relief sought.

** Brief for State defendants at 14.

rates be developed." S. Rep. No. 1240, 94th Cong., 2d Sess. 4 (1976).

The State defendants' reliance on De La Rama Steamship Co. v. United States, 344 U.S. 386, 390 (1953), for the proposition that "[w]hen the very purpose of Congress is to take away jurisdiction, of course it does not survive, even as to pending suits, unless expressly reserved" manifests a fundamental misconception of Pub. L. No. 94-552. The purpose behind the repeal of 42 U.S.C. §§1396a(g) and 1396b(l) simply was not to oust the federal courts of jurisdiction over Medicaid-based claims. Rather, the repeal was designed only to eliminate the mandatory waiver requirement and remove the reduction in funding provision contained in those sections.

Pub. L. No. 94-552 did not oust the federal courts of any jurisdiction that they might otherwise have had the power to exercise because that statute could only have worked an ouster of jurisdiction if the provision it repealed had granted jurisdiction. However, 42 U.S.C. §§1396a(g) and 1396b(l) contained no such jurisdictional grant. Rather, the former section dealt only with waiver of immunity to suit and the latter with the penalties that would be assessed for a state's failure to waive (See discussion at pages 16-17, supra).

It is well settled that the Eleventh Amendment

is not jurisdictional. Thus, in Edelman v. Jordan, 415 U.S. 651, 678 (1974), the Supreme Court did not state that the Eleventh Amendment was jurisdictional, but rather that the "defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." (emphasis supplied).

If the Eleventh Amendment were jurisdictional, then the Edelman Court would not have been able to hold, as it did, that the Eleventh Amendment could be expressly waived. 415 U.S. at 673. It is a first principle of federal practice that subject matter jurisdiction in the federal courts may not be conferred by consent. See, e.g., California v. LaRue, 409 U.S. 109, 112-13 n.3 (1972); Brenner v. Manson, 383 U.S. 519, 523 (1966).

Rather than being jurisdictional, the Eleventh Amendment is remedial in nature. This is apparent from Edelman, supra, in which the Supreme Court's decision centered on the varieties of prospective relief available under the amendment, and the retroactive relief barred by it. As Mr. Justice Stevens noted in his concurring opinion in Fitzpatrick v. Bitzer, 96 S. Ct. 2666, 2673 (1976):

> "Although I have great difficulty with a construction of the Eleventh Amendment which acknowledges the federal court's jurisdiction of a case and merely restricts the kind of relief the federal court may grant, I must recognize that it has been so construed in Edelman v. Jordan . . . ."

Furthermore, Congress recognized that it was passing remedial and not jurisdictional legislation when it repealed 42 U.S.C. §1396a(g). Thus, the Senate Committee on Finance, after proposing that the Department of Health, Education and Welfare create an administrative mechanism for the consideration and adjudication of provider grievances over reimbursement rates, stated:

> "The development and promulgation of these regulations should not be construed as in any way contravening or constraining the rights of the providers of Medicaid services, the State Medicaid agencies, or the Department to seek prospective, injunctive release [sic] in a federal or state judicial forum. Neither should the repeal of Section 1902(g) [42 U.S.C. §1396a(g)] be interpreted as placing constraints on the rights of the parties involved to seek such prospective, injunctive relief." S. Rep. No. 1240, at 4.

In short, the State defendants' reliance on De La Rama Steamship Co., supra, is misplaced. Congress did not have to include a saving provision in Pub. L. No. 94-552 because it was not repealing a grant of subject matter jurisdiction.

The State Defendants Waived Their Eleventh Amendment Immunity on Two Other Occasions

In addition to the express statutory waiver executed on behalf of the State of New York pursuant to 42 U.S.C. §1396a(g), the State defendants also waived their Eleventh Amendment immunity on the record. This waiver occurred at a conference held on July 28, 1976 at which time the State defendants' attorney represented that the State would not

raise any Eleventh Amendment defense to a suit for money found to have been wrongfully withheld from the hospitals (see discussion at page 8, supra).

A judicial waiver, not unlike the one made by the attorney for the State defendants, was held binding and valid in Vargas v. Trainor, 508 F.2d 485 (7th Cir. 1974), cert. denied, 420 U.S. 1008 (1975). Vargas involved a challenge to the procedures followed by the Illinois Department of Public Aid in reducing public assistance benefits. After the District Court rejected the plaintiffs' claims, an application for an injunction pending appeal was made in the Court of Appeals. In their brief submitted in opposition to the motion, the State defendants in Vargas argued that the plaintiffs would not be irreparably injured if the injunction were not granted. This was because, as the brief represented, if plaintiffs were successful in their appeal they "'[would] be awarded any benefits wrongfully withheld.'" Id. at 492. In finding that this representation constituted a waiver of Eleventh Amendment immunity, the Court held:

> "A representation made in a judicial proceeding for the purpose of inducing the court to act or refrain from acting satisfies the requirements stated in Edelman. We therefore hold that defendant has deliberately waived the protection of the Eleventh Amendment."
>
> Id. at 492.

The representation made by State defendants' attorney to the District Court was offered to induce the Court to refrain from entering its injunction. It was therefore a deliberate waiver of the State defendants' immunity and provides an alternative basis for the District Court's retroactive payment order.

Moreover, a second Vargas-type waiver occurred when the State defendants agreed to pay interest on any monies ultimately determined to be retroactively due, in exchange for a stay of the order requiring payments to the hospitals pending the determination of the retroactivity issue. This agreement by the State defendants to pay the sums found to be due as well as interest for a specified period, was clearly made "to induce the court" to enter a stay order. Moreover, it was made without any reservation of Eleventh Amendment immunity that might exist to bar the necessity for making the payments. Thus, the State's Eleventh Amendment immunity was waived again. See Jordan v. Fusari, 496 F.2d 646, 651 (2d Cir. 1974), in which this Court recognized that an agreement by a state attorney general to make certain payments constituted a waiver of the state's Eleventh Amendment immunity.

The State defendants seek to avoid the effect of the waiver of Assistant Attorney General Fine, and the

waiver which occurred when the interest agreement was reached, by now arguing -- for the first time -- that these waivers were unauthorized. In essence, the State defendants claim that, absent express legislative authorization, or a clear state policy reflected in State case law, the attorney general -- who represented them before the District Court -- did not have the power to execute judicial waivers of the State's Eleventh Amendment immunity. However, the New York courts have held that the Attorney General does have such power and that actions by him during the course of a litigation can result in a waiver of immunity from suit which is binding on the state.

Thus, in Security National Bank v. Sabatelli, 38 Misc. 2d 503, 236 N.Y.S.2d 775 (Sup. Ct. 1962), the Court held:

> "[A]ny immunity that might have originally existed, has been waived by the Attorney General's actions in appearing generally, interposing an answer and asking for summary judgment in favor of the State, on the merits. It follows that he has consented to the State's being a party defendant, and he has in its behalf waived its immunity, if any, from suit herein (Maguire v. Monaghan, 206 Misc. 550 at pp. 554, 555, 134 N.Y.S.2d 320, at pp. 325, 326, 327, aff'd. 285 App. Div. 926, 139 N.Y.S.2d 883)."
>
> Id. at 504-05, 236 N.Y.S.2d at 777.

Other cases in which actions of the Attorney General during the course of a litigation have been construed as a binding

waiver of the State's immunity from suit include Maguire v. Monaghan, 206 Misc. 550, 134 N.Y.S.2d 320 (Sup. Ct. 1954) (McGivern, J.), aff'd, 285 App. Div. 926, 139 N.Y.S.2d 883 (1st Dep't. 1955); 39th-40th Corp. v. Port of New York Authority, 188 Misc. 657, 658, 65 N.Y.S.2d 712, 713 (Sup. Ct. 1946) (Botein, J.).

In re Woitasek, 179 Misc. 947, 40 N.Y.S.2d 514 (Sup. Ct. 1943), the most recent New York case relied upon by the State defendants, is readily distinguishable from the general line of authority. In that case, a state agency had sued the committee of a deceased incompetent to recover sums due for care and maintenance. The committee counterclaimed for the value of the services allegedly rendered by the incompetent to the State during his confinement. In deciding what, in effect, was the State's motion to dismiss the counterclaim, the Court merely held that "there can be no offset for any claim made against the State of New York except as provided by statute ...." Id. at 948, 40 N.Y.S.2d at 515. Although the Court gratuitously noted that "the Attorney General may not waive the state's immunity from any action" (id.), it is apparent that, unlike the instant case, the Attorney General in Woitasek did not engage in activities which could reasonably have been construed as a waiver of the State's immunity from suit.

Seitz v. Messerschmitt, 117 App. Div. 401, 102 N.Y.S. 732 (1st Dep't), aff'd, 188 N.Y. 587 (1907), the only other New York case cited by the State defendants, is similarly distinguishable since the Court merely held that "a sovereign State could not be sued in its own courts without its consent." Id. at 402, 102 N.Y.S. 733, and that a plaintiff could not coerce the State into giving such consent by the mere expedient of naming the Attorney General as a party to the action. Unlike the instant case, there was no indication in Seitz that the Attorney General had engaged in any activities which could be construed as a waiver of the State's immunity from suit.

Thus, it is clear that the New York courts have recognized that the Attorney General has the power to waive the State's immunity from suit and that his actions during the course of a litigation can result in such a waiver.

In any event, it is significant that, until this appeal, the State defendants never asserted their claim regarding the Attorney General's lack of authority to waive immunity. They never asserted this claim before the District Court, nor did they raise it on the two previous occasions when they appeared before this Court. Instead, they led Judge Lasker to believe that the waivers had been made in

good faith.* Relying upon the representations of the Attorney General, Judge Lasker was induced to enter a stay of his August 2nd judgment.

The result of the delays thus extracted has been that, despite the entry of an order on August 2nd that payments be made, these payments thus far have been delayed for more than five months. Now, having engendered this delay by their own apparent misconduct, the State defendants seek to avoid their obligation to make these payments at all! We submit that the State defendants' attempt to play "fast and loose" with the federal judiciary should not be tolerated by this Court.

Quite simply, the State defendants may not avail themselves of the Eleventh Amendment as a bar to the relief plaintiffs seek. Since the legislation repealing 42 U.S.C. §1396a(g) did not purport to oust the federal courts of

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* In view of the fact that the issues raised by this case are of paramount importance to the State of New York, as well as to the hospitals, it strains credulity to think that the judicial waivers made in this litigation were not authorized by the State defendants themselves, all of whom are officials at the highest levels of the State government (Governor Carey, Commissioner Toia, Commissioner Whalen, Budget Director Goldmark). Indeed, prior to agreeing to the waiver involving the interest agreement, Assistant Attorney General Fine told the Court that he "would have to clear it with the people in Albany" (531a). Thus, since the record contains no assertion to the contrary, it must be presumed that this waiver was in fact authorized at the highest levels of the State government before it was made.

jurisdiction over lawsuits already commenced, or revive Eleventh Amendment immunities already waived, the waiver executed pursuant to that statute may not be rescinded with respect to this lawsuit. Moreover, by specific stipulation on the record, the State defendants, through their attorney, have waived any Eleventh Amendment immunity that might otherwise have existed.

POINT II

THE STATE DEFENDANTS' CLAIM THAT THE DISTRICT COURT IMPROVIDENTLY EXERCISED ITS GENERAL EQUITY JURISDICTION CANNOT BE SUSTAINED

For the first time the State defendants now claim that the District Court's retroactive payment order represented "an improvident exercise of [its] general equity jurisdiction."* Put another way, the State defendants contend that the District Court was guilty of an abuse of discretion. The State defendants' argument is utterly without merit because: (1) the Eleventh Amendment waiver requirement in the Medicaid Act did not grant the District Court discretion to refuse to award retroactive monetary relief; (2) even if the waiver statute granted such discretionary powers, no abuse of discretion was committed here; and (3) in any event, the State defendants have waived any right to make this claim.

Because the very purpose of the waiver requirement in the Medicaid Act was to insure that providers would be able to obtain monetary awards in federal court, the State defendants' assertion that the award of such relief was placed within the discretion of the District Court is absurd. As the legislative history of Pub. L. No. 94-552 makes clear,

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* Brief for State defendants at 24.

42 U.S.C. §1396a(g) was designed to enable providers of Medicaid services to obtain money judgments against states in federal courts. The House Report summarized the situation before the passage of 42 U.S.C. §1396a(g) as follows:

> "Although the providers could sue the State to enjoin action States were immune from suits which would require payment of funds unless the State waived its immunity from such actions. The provision requiring States to consent to be sued in the Federal courts on issues relating to the payment of reasonable cost of hospital care effectively removed that immunity." H.R. Rep. No. 1122 at 4.

In light of the manifest legislative intention to give providers the right to obtain orders requiring the payment of state funds, it is illogical to think that Congress also intended to vest the district courts with the discretion to refuse to order such payments once illegal state action had been established.

Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), cert. denied, 411 U.S. 921 (1973), the case upon which the State defendants place their principal reliance, is wholly inapposite. Unlike the instant case, Rothstein involved a suit on behalf of welfare recipients. The Second Circuit reversed an award of retroactive welfare benefits which would have been paid well after the payments were due, and after

the time of need had presumably passed. By contrast, this case involves payments to providers of services, i.e., reimbursement for costs incurred in the rendering of care and treatment to Medicaid patients. The hospitals' claims are essentially for breach of contract and thus are legal, not equitable.

The contracts which were breached here were unilateral, made each time a hospital provided a day of care. This is because the State Plan is an offer by state officials to reimburse hospitals according to the formula set forth therein, and this offer is accepted -- thereby resulting in a binding contract -- each time services are rendered by a hospital to Medicaid patients. See Seneca Nursing Home v. Kansas State Board of Social Welfare, 490 F.2d 1324 (10th Cir. 1974), cert. denied, 419 U.S. 841 (1974); 1 S. Williston, Contracts §§13, 65 (3d ed. 1957).

Seneca Nursing Home, supra, involved the question of whether or not a unilateral contract comes into being when a nursing home provides Medicaid services. The Court found that it did, analyzing the contract issue as follows:

> "The terms and conditions for performance of services required of the plaintiffs were set forth by the state plans filed with the Secretary of Health, Education and Welfare. Payment pursuant to the statutory standard of reasonable, usual and customary charges became part of the arrangement. See Securities Acceptance Corp. v. Perkins, 182 Kan. 169, 318 P.2d 1058, 1061. And such a

> contract may be made binding and mutual by the performance contemplated, and the receipt of promised benefits. Commercial Asphalt, Inc. v. Smith, 196 Kan. 164, 409 P.2d 796." Id. at 1332.

Prior to the dates of the Secretary's approval of the amendments (August 16 and October 4, 1976), the "offer" made by the State was to reimburse the hospitals in conformity with the approved New York State Plan then in effect. All Medicaid services rendered by the hospitals prior to those dates constituted "acceptances" of this "offer" and the hospitals were therefore entitled to payment under the approved reimbursement methodology. Therefore, the imposition of the freeze by the State defendants (from January 1, 1976 to June 30, 1976) and the implementation of the unapproved New York State Plan amendments (commencing July 1, 1976) constituted a breach of the State defendants' contracts with the hospitals. The District Court's judgment and order merely awarded the hospitals damages for this breach. Thus, it is clear that Rothstein, which dealt with the exercise of equitable discretion, is inapplicable to this case, which involves a legal cause of action.

Nevertheless, even if the hospitals' prayer for relief can somehow be characterized as equitable, and this somehow vested the District Court with discretion to refuse to make an award of money, it is clear that no abuse of discretion was committed here. Unlike Rothstein, in which this Court re-

cognized that "Congress ha[d] not addressed itself explicitly to the question of court-ordered retroactive payments" (467 F.2d at 234), in the instant case Congress did focus on this issue. As we have demonstrated above (see discussion at page 34-35, supra), the very purpose behind 42 U.S.C. §1396a(g) was to make retroactive monetary relief available.

Moreover, insofar as the three policy considerations relevant to the award of retroactive monetary relief set forth in Rothstein have any application to the District Court's award, they were satisfied in the instant case.* First, the State defendants clearly acted in bad faith. Not only did they flout an unequivocal directive of the Medicaid Act -- the pre-implementation approval requirement -- but they then attempted to apply the amendments, once approved, retroactively. The only justifications offered for this latter

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* One of the policy considerations discussed in Rothstein is inapplicable to the instant case. In Rothstein, the Court stated that an award of retroactive welfare payments was justified when that award would satisfy the ascertained needs of the beneficiaries which the welfare program was designed to meet. As the time between the date on which the welfare benefits should originally have been paid and the time they were ordered by the Court lengthened, the award resembled one for damages. This was because the need which the welfare benefit was designed to satisfy presumably had passed by the time the award was ultimately made. In the instant case, the payments the hospitals seek are not to cover "needs", but rather to reimburse them for costs incurred in providing care and services.

course of action were found by the District Judge to be without "any merit" (Transcript of November 4, 1976 conference at 557a).

Second, in the instant case, Congress has demonstrated an interest in seeing that federal funds are spent in accordance with federal law, and that retroactive monetary awards be available to redress violations. This interest is manifested by the Eleventh Amendment waiver requirement found in 42 U.S.C. §1396a(g) and the pre-implementation approval requirement found in 42 U.S.C. §1396a(a)(13)(D). This contrasts sharply with the situation in Rothstein, where this Court found no indication that Congress thought retroactive payment awards were necessary to protect the federal interest.

Finally, the State defendants have, quite simply, waived any right to claim that the District Court abused its discretion in granting the retroactive payment judgment and order. At no point in the proceedings below did the State defendants even suggest that the District Court had the discretionary right to deny the retroactive relief the hospitals were granted. (Nor did they direct the District Court's attention tc any facts which would support an exercise of such discretion in their favor.) The State defendants cannot now complain that the District Court abused discretion it was never asked to exercise.

POINT III

THE DECLARATORY AND PROSPECTIVE INJUNCTIVE PORTIONS OF THE DISTRICT COURT'S JUDGMENT AND ORDER ARE NOT BARRED BY THE ELEVENTH AMENDMENT AND SHOULD BE AFFIRMED

In addition to the award of retroactive monetary relief, the District Court's judgment and order contained a declaration of rights and a prospective injunction. It is well settled that the Eleventh Amendment does not bar these latter forms of relief granted by the District Court.

Edelman v. Jordan, 415 U.S. 651 (1974), is directly on point. In that case, the plaintiffs claimed that state officials were administering a Social Security program similar to Medicaid in a manner inconsistent with various federal regulations and the Fourteenth Amendment. The District Court agreed and entered an order declaring certain state regulations to be inconsistent with federal regulations and requiring compliance with federal law. In an opinion which broadly examined the scope of the Eleventh Amendment, the Supreme Court stated:

> "Petitioner concedes that Ex parte Young, supra, is no bar to that part of the District Court's judgment that prospectively enjoined petitioner's precedessors from failing to process applications within the time limits established by the federal regulations." 415 U.S. at 664.

Similarly, in Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), cert. denied, 411 U.S. 921 (1973), the case upon which the State defendants rely so heavily, this Court concluded that declaratory and prospective injunctive relief were available to protect against a violation of federal law by state officials. In the course of its extensive discussion of the Eleventh Amendment, this Court held:

> "What is clear is that declaratory and injunctive relief can be granted against state officials which prohibit the continued enforcement of state welfare statutes or regulations which are either unconstitutional or not in keeping with standards deriving from federal statutes." 467 F.2d at 241.

To the same effect, see Stanton v. Bond, 504 F.2d 1246 (7th Cir. 1974), cert. denied, 420 U.S. 984 (1975) (injunction against state officials' failure to comply with Medicaid Act and regulations); Rochester v. White, 503 F.2d 263 (3d Cir. 1974) (Eleventh Amendment does not bar declaratory judgment that reduction in AFDC benefits violates federal regulations); Solin v. State University of New York, 416 F. Supp. 536 (S.D.N.Y. 1976) (Eleventh Amendment does not bar declaratory and injunctive relief against State practice prohibited by federal statute); Kozinski v. Schmidt, 409 F. Supp. 215 (E.D. Wis. 1975) (Eleventh Amendment does not bar prospective injunction against Supremacy Clause violation); Henry v. Link, 408 F. Supp. 1204 (D.N.D. 1976)

(Eleventh Amendment does not bar prospective injunction and declaratory relief against Title VII violation).

In the instant case, both the August 2nd judgment and the November 9th order contained declarations of rights. Thus, in the second decretal paragraph of the August 2nd judgment, the District Court adjudged the challenged amendments to the State Plan "unlawful because the said regulations have not been approved by the Secretary." (430a). And, in the November 9th order, the District Court declared that these regulations could not be retroactively applied "but may be applied only from the date on which they were approved by HEW." (566a).

In addition, the August 2nd judgment, while concededly having retrospective application, also had a prospective effect. Although the judgment contained a provision staying its effectiveness for twelve days, this stay lapsed and was not in effect, on August 15, 1976. The Secretary approved most of the amendments to the New York State Plan on August 16, 1976. Therefore, on August 15, 1976, the State defendants were enjoined, by court order, from applying the amendments to the New York State Plan <u>until</u> they had been approved by the Secretary. Similarly, since one of the amendments at issue, 10 NYCRR §86.26, was not approved by the Secretary until October 4, 1976, the State defendants were prospectively enjoined from implementing that provision be-

tween August 15, 1976 and October 3, 1976.

In short, it is clear that the District Court awarded declaratory and prospective injunctive relief which was not barred by the Eleventh Amendment. In view of the fact that the State defendants have waived any claim that the District Court erred on the merits of this case,* the declaratory and prospective injunctive aspects of the District Court's order and judgment should be affirmed.

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* See discussion in footnote at page 13, supra.

CONCLUSION

For the foregoing reasons, the judgment and order of the District Court should be affirmed in all respects.

Dated: New York, New York
January 17, 1977

Respectfully submitted,

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M. William Scherer being duly sworn, deposes and states:

I am not a party to the action, am over 18 years of age and reside at 235 West End Avenue, New York, New York

On December 17, 1977, I served the attached upon the following attorney(s) at the address designated by ~~him~~ (them) for that purpose:

See attached

Said service was made by depositing ~~a~~ two true copies of the attached Brief for Plaintiffs-Appellees

enclosed in a postpaid properly addressed wrapper, in ~~an official depository~~ a post office under the exclusive care and custody of the United States Post Office Department within the State of New York.

M. William Scherer

M. William Scherer

Sworn to before me this

17 day of December, 1977

Notary Public

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